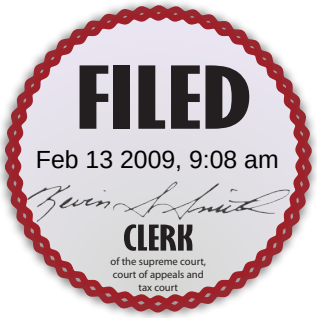

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IN THE
COURT OF APPEALS OF INDIANA

DERRICK SANDERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0804-CR-196
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0710-FB-3350

February 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Derrick Sanders appeals his sentence for aggravated battery, a Class B felony.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On July 2, 2007, Sanders and three of his friends accosted Joseph McKee, who was riding his bicycle. They knocked McKee off his bicycle, severely beat him, and left him in a pool of his blood. McKee sustained permanent injuries that significantly limit his ability to perform ordinary tasks, such as bathing and eating.

On July 19, 2007, the State filed a petition alleging Sanders was delinquent for committing aggravated battery, a Class B felony if committed by an adult. Sanders, who was seventeen at the time of the offense, was waived into adult court. On February 25, 2008, Sanders pled guilty to aggravated battery in exchange for a fourteen-year cap on his sentence.

The sentencing hearing was held on March 27, 2008. The trial court found two aggravators: Sanders' juvenile record and the seriousness of the offense. The trial court found Sanders' age "is something of a mitigating circumstance, but he certainly was old enough to know that you have to take responsibility for your actions." (Tr. at 76-77.) The trial court imposed a fourteen-year executed sentence.

DISCUSSION AND DECISION

Sanders challenges his sentence on several grounds. We restate the issues raised as: (1) whether the trial court abused its discretion by not finding his plea mitigating, (2)

[1] Ind. Code § 35-42-2-1.5.

whether the trial court erred by finding an improper aggravator, and (3) whether his sentence is inappropriate.[2]

1. Mitigating Circumstances

Sentencing decisions rest within the sound discretion of the trial court and are reviewed for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id*. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Id*. at 493.

Sanders argues his guilty plea should be recognized as a mitigator because he pled guilty as charged and he "did not receive any benefit" from his plea. (Appellant's Br. at 9.) On the contrary, Sanders received the benefit of a cap of fourteen years, where the offense carried a potential penalty of twenty years. *See* Ind. Code § 35-50-2-5 (maximum sentence for a Class B felony is twenty years).

Furthermore, the trial court questioned whether Sanders was genuinely remorseful: "What draws my attention most is . . . the fact that in his incarceration he received seventeen disciplinary write-ups. This does not present a picture to me of someone who is remorseful, is attempting to get his life together and to go forward." (Tr. at 77.)

[2] Sanders makes a brief argument that his sentence violates *Blakely v. Washington*, 542 U.S. 269 (2004). Sanders committed his offense on July 2, 2007. Our sentencing statutes were amended effective April 25, 2005 to permit a trial court to impose any sentence within the statutory range, thus remedying the Sixth Amendment violation identified by *Blakely*. *Robertson v. State*, 871 N.E.2d 280, 283 (Ind. 2007). This argument is not available to Sanders.

Therefore, we cannot say the trial court abused its discretion by failing to recognize Sanders' guilty plea as mitigating. *Cf. Cloum v. State*, 779 N.E.2d 84, 90 (Ind. Ct. App. 2002) (guilty plea was entitled to some weight where record demonstrated Cloum was remorseful and accepted responsibility for his actions).

2. Aggravating Circumstances

Describing the aggravating circumstances it found, the trial court stated:

> The court finds that the crime herein was a vicious attack on the victim for no reason other than downright meanness, which has rendered the victim unable to care for himself or . . . to be employed. This court finds this was a horrific beating and has greatly affected his immediate family as a result of said injuries.

(Appellant's App. at 18.) Sanders argues this aggravator is improper because the trial court relied on evidence that elevated his offense to a Class B felony. *See* Ind. Code § 35-42-2-1.5 (a person commits aggravated battery if the injury creates a substantial risk of death, causes serious permanent disfigurement, causes protracted loss or impairment of a member or organ, or causes the loss of a fetus).

A trial court may abuse its discretion by finding an aggravator that is not supported by the record or that is improper as a matter of law. *Anglemyer*, 868 N.E.2d at 490-91. In the past, we have held a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance. *See, e.g.*, *Burgess v. State*, 854 N.E.2d 35, 41 (Ind. Ct. App. 2005). Our Supreme Court addressed the use of criminal history as an aggravator and as a fact that elevates the charge in *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008). The Court held this is no longer an inappropriate double enhancement because aggravators do not "enhance" sentences under the advisory

sentencing scheme. *Id*. "Still, a trial court that imposed a maximum sentence, explaining *only* that an element was the reason, would have provided an unconvincing reason that might warrant revision of sentence on appeal." *Id*.

In Sanders' case, the trial court commented on the extent of McKee's injury, which is an element of aggravated battery, but also noted Sanders' motive was "downright meanness." (Appellant's App. at 18.) At the sentencing hearing, Detective Kayle Pickens testified concerning possible motives that had been identified:

> [S]ome of the defendants had explained in the initial part of the incident . . . that this guy who was Mr. McKee, had ridden by on the bicycle and had verbally insulted [Craig Coterel] somehow, and Craig at that point decided that they were going to confront the subject and settle the issue. Another defendant, [J.M.], had mentioned that it was part of a game that they would play called "point and knock them out" . . . . And [J.M.] said they . . . would just drive around town when it was dark and find an isolated person and beat them up for no reason . . . .

(Tr. at 8-10.) This testimony supports the trial court's finding that Sanders' motive was "downright meanness," and it is part of the nature and circumstances of the offense, which the trial court may properly consider. *See Anglemyer*, 868 N.E.2d at 492 (nature and circumstances of the crime has long been held a valid aggravator).

3. Appropriateness of Sentence

Although a trial court may have acted within its lawful discretion, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review of sentences. *Id*. at 491. This authority is implemented through Ind. Appellate Rule 7(B), which provides the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is

inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

As to Sanders' character, we note he already had four true findings by the time he committed this offense: criminal mischief with a vehicle (a Class B misdemeanor if committed by an adult), battery (a Class A misdemeanor if committed by an adult), and two counts of possession of marijuana (Class A misdemeanors if committed by an adult).[3] Sanders was in juvenile detention from July 17, 2007 to October 25, 2007 in connection with this case, and during that time, he received seventeen disciplinary write-ups. This is a significant criminal history considering Sanders' age.

We agree with the trial court that the nature of the offense is horrific. After the beating, McKee was "comatose for quite some time." (Tr. at 10.) McKee was hospitalized until November 2007, and then spent time in a nursing home. He was placed on a ventilator and was unable to communicate. McKee had several broken bones in his face and had to wear a neck brace. After the neck brace was removed, his wife realized McKee had missing teeth. McKee was fed through an I.V. and then a feeding tube. The feeding tube remained until McKee was able to go home. McKee's wife, Elizabeth, testified his ear was swollen to the size of a baseball, and he lost some of the hearing in

[3] Additional charges of resisting law enforcement (a Class D felony if committed by an adult), possession of cocaine or a narcotic drug (a Class D felony if committed by an adult), disorderly conduct (a Class B misdemeanor if committed by an adult), and operating a vehicle with a blood alcohol content of .10% or a controlled substance in the body (a Class C misdemeanor if committed by an adult) were filed, but Sanders was eventually released from detention without further action on those charges.

that ear. She also testified he "could not see anything or anyone for quite sometime" because his eyes were swollen. (*Id*. at 24.)

McKee once enjoyed camping, hunting, fishing, outdoor work, and working on cars. He now stays home and receives disability benefits. He cannot move his right side and cannot complete simple tasks such as bathing, taking out the trash, or feeding his dogs. His wife has to supervise him when he eats because he has difficulty chewing and swallowing, and he sometimes chokes. At the time of the sentencing hearing, McKee was still participating in physical therapy and counseling. He has not been given any prospect for future improvement.

According to a co-defendant, this beating was part of a "game." (*Id*. at 9.) We find nothing amusing about this game, nor do we find anything in Sanders' character or the nature of his offense that warrants revision of his sentence. Therefore, we affirm.

Affirmed.

BRADFORD, J., and FRIEDLANDER, J., concur.